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"BUT WHOEVER TREASURES FREEDOM . . .": THE RIGHT TO TRAVEL AND EXTRATERRITORIAL ABORTIONS†

*Seth F. Kreimer**

I. THE NATURE OF THE PROBLEM

My thinking on the subject of extraterritorial regulation of abortions was sparked originally by two events that occurred about a year ago. The first was the Supreme Court's grant of certiorari¹ in *Planned Parenthood v. Casey*,² to address the question of whether *Roe v. Wade*³ remained the law of the land. At the time, the betting was that, with the substitutions of Justice Thomas for Justice Marshall and Justice Souter for Justice Brennan, the Court would answer "no"; abortion would be remitted entirely to the political process. The expected green light created the risk of a checkerboard of abortion rights, with some states dedicated to the total elimination of abortion and others equally committed to the protection of reproductive autonomy, either as a matter of statute or of state constitutional law. This result appeared likely to reinstate the pattern that existed in the years immediately before *Roe*, under which more than forty percent of abortions were performed for women outside of their home states. Women with resources traveled from restrictive states to more liberal ones to obtain abortions.

But the world has become more polarized on the abortion issue in the past twenty years. A system that might have been in equilibrium in 1971 seemed destined in 1992 to draw further efforts by anti-abortion forces in restrictive states to prevent women from taking advan-

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* Professor of Law, University of Pennsylvania. A.B. 1974, J.D. 1977, Yale. — Ed. A version of this article was delivered to the AALS Conflict of Laws Section at the AALS Convention in San Francisco in January 1993. My thanks to Gerry Neuman and Lea Brilmayer for their comments both in and out of that forum.

The partial quotation in the title is from "Dona Dona," a song originally written for the Yiddish musical *Esterke* by Aaron Zeitlin in 1940. The relevant couplet in English translation is:

"Calves are easily bound and slaughtered, never knowing the reason why,
But whoever treasures freedom, like a swallow will learn to fly."

1. 112 S. Ct. 931 (1992).

2. 112 S. Ct. 2791 (1992). As a matter of full disclosure, I should note that I was one of the members of the counsel team for the appellant clinics in *Casey* and remain involved in the litigation on remand.

3. 410 U.S. 113 (1973).

tage of the options available elsewhere. One straw in the wind was a second event, this one in Ireland, that occurred at about the same time the Court granted certiorari in *Casey*. Officials of Ireland, which by constitutional amendment prohibited abortion, sought an injunction to prevent a fourteen-year-old Irish rape victim from traveling to England to terminate the pregnancy that resulted from the rape. Although the Irish Supreme Court ultimately reversed the injunction on the ground that the young woman's threats of suicide made her plight so severe as to permit an abortion within the strictures of Irish law,⁴ the opinions in the case did not deny the government's ability in future cases either to prevent travel to obtain abortions or to prosecute women once they had returned. This latter possibility was particularly sobering in light of the West German practice, highlighted a year earlier, of engaging in forced gynecological searches at the Dutch border and prosecuting women who had avoided restrictive West German abortion laws by obtaining abortions in the Netherlands.⁵ The question that seemed pressing at the time was whether restrictive American jurisdictions would be permitted to emulate officials in Ireland and Germany, either by seeking to prevent women from leaving the jurisdiction to obtain abortions, or by endeavoring to prosecute them upon their return.

For many reasons, the beginning of 1993 looks substantially different from the beginning of 1992. German unification has made the liberal abortion regime of East Germany available to West German women, and a more permissive unified German abortion law seems to be in the cards.⁶ Irish voters have amended the Irish constitution to

4. Attorney Gen. v. X [1992] I.R.L.M. 401 (Ir. S.C. Mar. 5, 1992) (LEXIS, Ireland library, Cases file).

5. See EUR. PARL. DEB. (3-403) 202-05 (Mar. 14, 1991) (debate on resolutions condemning compulsory gynecological examinations by German officials of returning German women at the Dutch-German border); *id.* at 203 (statement of Rep. Van Den Brink) (stating that over 6000 German women have had abortions in the Netherlands); *id.* at 204 (statement of Rep. Kerpelhoff-Wiechert) (defending searches on the ground that officials "are required by the code of criminal procedure to investigate illegal abortions of this kind carried out abroad"); Nina Bernstein, *Germany Still Divided on Abortion*, NEWSDAY, Mar. 11, 1991, at 5, 13 (reporting an account of a German woman returning from the Netherlands who was forced to submit to a vaginal examination at a Catholic hospital near the border and was charged with having an illegal abortion; noting that German Interior Ministry acknowledges the practice; citing a study by the Max-Planck-Institut in Freiburg that found such "inquisition[s]" to be "standard practice"); Karen Y. Crabbs, *The German Abortion Debate: Stumbling Block to Unity*, 6 FLA. J. INTL. L. 213, 222-23 (1991) (describing prosecutions and searches). The European Parliament condemned the searches and resolved that "the internal borders of the [European] Community may not be used to threaten citizens with prosecution for activities that are perfectly legal in some Member States but not in others." Resolution on Compulsory Gynaecological Examinations at the Dutch-German Border of Mar. 14, 1991, 1991 O.J. (C 106) 13.

6. See Michael G. Mattern, Note, *German Abortion Law: The Unwanted Child of Reunification*, 13 LOY. L.A. INTL. & COMP. L.J. 643, 686 n.360 (1991). With reunification, the decision to retain East Germany's substantially more permissive abortion law within the old East German

permit both travel to obtain extraterritorial abortions and the circulation of information regarding such opportunities.⁷ Most importantly, in *Planned Parenthood v. Casey*, the Supreme Court held by a five-to-four margin that states may not impose "undue burdens" on the opportunities of women to obtain abortions, and it has recently denied certiorari in *Ada v. Guam Society of Obstetricians and Gynecologists*,⁸ which invalidated Guam's effort to prohibit abortions. Thus, the specter of an immediate return to the days before *Roe* has been dispelled.

But *Casey* did not fully reaffirm *Roe*. Absolute bans on abortion remain impermissible, but the *Casey* plurality nonetheless permitted limitations which in its view had neither the "purpose [nor the] effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁹ On the record before them, the Justices in *Casey* upheld both Pennsylvania's twenty-four hour waiting period for all women and its parental consent requirement for women under eighteen seeking abortions. The Court has recently denied certiorari in *Barnes*,¹⁰ which upheld Mississippi's twenty-four hour waiting requirement against facial challenge. In the absence of congressional action, we can expect a new generation of abortion statutes from anti-abortion states that seek to impose limits as extreme as the Supreme Court's "undue burden" standard will permit. These limits will be juxtaposed with statutes and state constitutional protections in neighboring states that affirmatively protect reproductive autonomy even more fully than *Roe*.

borders provided the option of traveling to East Germany as well. *Id.* at 652 & n.47, 686. The new, liberalized uniform abortion law that the unified German legislature has adopted ameliorates the problem, although the law itself is being challenged in the German Constitutional Court. See Tamara Jones, *Abortion Is Legalized in Germany*, L.A. TIMES, June 26, 1992, at A10.

7. See, e.g., William Tuohy, *Irish Reject A Move To Allow Abortions*, L.A. TIMES, Nov. 28, 1992, at A5 (noting that an amendment regarding the substance of the abortion law was rejected at the same time that amendments permitting circulation of information regarding extraterritorial abortions and the right to travel were accepted by lopsided margins); *Ireland Rejects Abortion Referendum Proposals*, REUTER LIBR. REP., Nov. 28, 1992, available in LEXIS, Nexis Library, Intl. File (noting that the travel amendment was approved by 62.3% of voters and the information amendment was approved by 59.8%). The amendments read:

Subsection 3 of this section shall not limit freedom to travel between the State and another state.

Subsection 3 of this section shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

See Geraldine Kennedy, *Attorney General Believes Abortion Legislation Will Still Be Necessary*, IRISH TIMES, Oct. 12, 1992, at A1, available in LEXIS, Nexis Library, Intl. File.

The European Human Rights Court has held that Irish efforts to prohibit dissemination of information about the availability of overseas abortions violate the European Human Rights Convention.

8. 962 F.2d 1366 (9th Cir.), cert. denied, 113 S. Ct. 633 (1992).

9. 112 S. Ct. at 2820.

10. *Barnes v. Moore*, 970 F.2d 12 (5th Cir.), cert. denied, 113 S. Ct. 656 (1992).

Pennsylvania's statute has yet to take effect, but in Mississippi abortion opponents have used the twenty-four hour waiting period as an opportunity to track down and harass women seeking abortions.¹¹ As a result both of these efforts and of the delays and burdens of requiring two trips to abortion clinics, abortions within Mississippi have fallen off by fifty percent.¹² At least part of this reduction, however, reflects a displacement of the site of abortions to neighboring states without such waiting periods.¹³ Just as in the years before *Roe*, women in Mississippi appear to be making use of interstate travel to avoid burdensome regulations. Similarly, young women regularly travel out of their home states to avoid parental consent requirements.¹⁴ We can, I think, expect that zealous opponents of abortion will attempt to prevent such results. It is thus only a matter of time before American courts face the shadow of the issue before the voters of Ireland: may women seek to obtain abortions extraterritorially under circumstances that would be illegal at home?¹⁵

The question initially is one of statutory construction, and often statutes will answer the question in the negative on their faces. Some provisions, like Pennsylvania's, appear by their own terms limited to abortions performed within the regulating state.¹⁶ Others, like Ten-

11. See, e.g., William Booth, *Mississippi's 24-Hour Countdown for Abortions*, WASH. POST, Nov. 7, 1992, at A1, A6; Fawn Vrazo, *A Preview of Limited Abortion*, Phila. Inquirer, Sept. 14, 1992, at A1.

12. Booth, *supra* note 11, at A6; Alissa Rubin, *The Abortion Wars Aren't Over*, WASH. POST, Dec. 13, 1992, at C2; Vrazo, *supra* note 11.

13. Rubin, *supra* note 12; David Snyder, *Abortion Waiting Period Debated*, NEW ORLEANS TIMES PICAYUNE, Nov. 9, 1992, at A1, A8 (reporting an increase in the number of women from Mississippi at abortion clinics in Shreveport and Memphis); Vrazo, *supra* note 11, at A6 (noting that abortion clinics in New Orleans and Memphis report a rise in Mississippi patients).

14. E.g., Tamar Lewin, *Parental Consent to Abortion: How Enforcement Can Vary*, N.Y. TIMES, May 28, 1992, at A1, B8 (noting that Indianapolis abortion clinics advise teenagers seeking abortions without parental consent to go to neighboring Kentucky or Illinois and that one hundred teenagers a month have left Massachusetts to avoid parental consent requirement); *In re Jane Doe*, No. 68,501, 1992 Kan. App. LEXIS 597, at *2-3 (Kan. Ct. App. Aug. 28, 1992) (granting waiver of parental notification to unemancipated minor from out of state who sought abortion in Kansas).

The effect is not a new one. Robert Mnookin concluded that a major effect of the imposition of a parental consent requirement in Massachusetts in 1981 was that "many girls who formerly would have secured abortions in Massachusetts are now going to other states." ROBERT H. MNOOKIN, *IN THE INTEREST OF CHILDREN* 241-42 (1985).

15. Cf. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 792 & n.31 (1993) (Stevens, J., dissenting) (noting that "the right to enter another state for the purpose of seeking abortion services available there is protected by the Privileges and Immunities Clause"; thus, if *Roe* dissent became the law, "diversity among the States in their regulation of abortion procedures would magnify the importance of unimpeded access to out-of-state facilities").

16. Pennsylvania's 24-hour waiting period punishes "[a]ny physician who violates the provisions of this section" or who "performs or induces an abortion without first obtaining the certification required by subsection (a)(4) or with knowledge or reason to know that the informed consent of the woman has not been obtained." 18 PA. CONS. STAT. § 3205(c) (West Supp. 1992).

nessee's, contain no territorial limitations¹⁷ but are directly subject to general statutes that constrain state criminal jurisdiction to "offense[s] committed in this state."¹⁸ But Mississippi's statute falls into a third category: it subjects to criminal prosecution "[a]nyone who purposefully, knowingly or recklessly performs . . . an abortion" without complying with statutory mandates.¹⁹ When faced with such statutes, courts must decide whether either the traditional American presumption against extraterritorial criminal prosecutions²⁰ or constitutional

Its parental consent requirement forbids a physician from providing an abortion in the absence of the specified parental consent. 18 PA. CONS. STAT. § 3206(a) (West Supp. 1992).

The Pennsylvania statute defines "physician" as "[a]ny person licensed to practice medicine in this Commonwealth." 18 PA. CONS. STAT. § 3203 (West Supp. 1992). Thus, abortion providers outside of Pennsylvania (at least if they are not licensed to practice within the state) are not bound by either the 24-hour period or the parental consent requirement.

Section 3204 provides: "(a) . . . No abortion shall be performed except by a physician . . . (d) Penalty. Any person who intentionally, knowingly or recklessly violates the provisions of this section commits a felony of the third degree . . ." However, 18 PA. CONS. STAT. § 102(a)(1) (1983) limits Pennsylvania's criminal jurisdiction to situations in which "the conduct which is an element of the offense or the result which is such an element occurs within th[e] Commonwealth," except where the defining statute "expressly prohibits conduct outside th[e] Commonwealth when the conduct bears a reasonable relation to a legitimate interest of th[e] Commonwealth . . ." 18 PA. CONST. STAT. § 102(a)(6) (1983).

For referrals, § 102(a)(4) provides that Pennsylvania has criminal jurisdiction if "conduct occurring within th[e] Commonwealth establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of th[e] Commonwealth." 18 PA. CONS. STAT. § 102(a)(4) (1983) (emphasis added). Referrals to a state where the abortion is legal would not fall within this section since an abortion legal in the jurisdiction where it occurs would not be an "offense" in that jurisdiction.

17. TENN. CODE ANN. § 39-15-202 (1991) punishes as a felony failure by a physician to abide by a two-day waiting period for "[a]n abortion otherwise permitted by law."

18. TENN. CODE ANN. § 39-11-103 (1991); see *Edge v. State*, 99 S.W. 1098 (Tenn. 1907) (procuring abortion in sister state not indictable); cf. *supra* note 16 (citing Pennsylvania's general provisions regarding criminal jurisdiction); MODEL PENAL CODE § 1.03(1) (Proposed Official Draft 1962):

[A] person may be convicted under the law of this State . . . if:

(a) either the conduct that is an element of the offense or the result that is such an element occurs within this State; or . . .

(d) conduct occurring within the State establishes complicity in . . . an offense in another jurisdiction that is also an offense under the law of this State; or . . .

(f) a statute of this State . . . expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State . . .

The Model Penal Code has been adopted in 29 jurisdictions. § 103 cmt. 1.

19. MISS. CODE ANN. § 41-41-39 (Supp. 1992). This apparently general applicability may be limited by MISS. CONST. art. III, § 26, which requires a criminal case to be tried before the jury of the county in which the crime occurred. See *Mississippi Publishers Corp. v. Coleman*, 515 So. 2d 1163, 1165 (Miss. 1987) (en banc) (crime that occurred outside Mississippi could not be tried in Mississippi by a jury from the county where the crime occurred).

20. For discussion of the traditional American maxim that criminal statutes have no extraterritorial effect, see, for example, MODEL PENAL CODE § 1.03 cmt. 1 (Proposed Official Draft 1962); B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 621-28, 631 (1966) (arguing that no federal constitutional barrier stands in the way of extraterritorial prosecutions, but acknowledging that state constitutional limits in 29 states would prevent wholly extraterritorial prosecutions); Larry Kramer, Comment, *Jurisdiction Over Interstate Felony Murder*, 50 U. CHI. L. REV. 1431, 1433-39, 1448-51 (1983); Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44, 50 (1974) ("Probably

limitations circumscribe their reach beyond state borders. The issues will be whether Mississippi can prosecute doctors in neighboring states who perform abortions on women from Mississippi without providing a twenty-four hour waiting period, and whether Mississippi can prosecute such women as accessories upon their return to the state.

In a prior article,²¹ I addressed the problem of extraterritorial abortions under the assumption that the federal constitutional right of reproductive choice would be repudiated by the Supreme Court on Justice Scalia's theory that such rights lack sufficiently deep roots in the history and traditions surrounding the framing of the Constitution and the Fourteenth Amendment. I argued there that a constitutional methodology that relied on traditions and expectations of the Framers would provide a strong basis for concluding that the Constitution imposes severe limits on states' power to project their moralities extraterritorially.²² If Justice Scalia is serious about a regard for history and tradition, a right of American citizens to travel to more hospitable moral climates in other states is at least as solidly rooted as the power of states to prohibit abortions. The Framers both of the Constitution and of the Fourteenth Amendment wove into the fabric of the Constitution the presumption that states' regulatory authority ended at their own boundaries.

As it turns out, Justice Scalia did not prevail in *Casey*, and one cannot simply turn his methodology to the question of extraterritorial prosecutions. The conclusion that we should avoid such prosecutions is not, however, limited to a historically bound, originalist constitutional approach.

In this article, I undertake to examine the question further from a normative perspective. Assuming that courts do, or should, incorporate contemporary political insights into the legal structure, is the traditional presumption against extraterritorial prosecution in this context one that should, as a matter of political theory or practice, claim allegiance? I argue that, at least where American citizens seek to take advantage of locally legal abortion options in sister states, the home state should not be permitted to enforce its conflicting criminal

forum state citizenship alone would be too little if the defendant citizen's act were done in a sister state"); Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1164 (1971) (setting forth history of territorial principle in common law, and concluding that "no state may punish its citizen for what he does in the exclusive territorial jurisdiction of another state where what was done was lawful"); Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEXAS L. REV. 763, 781 (1960) (skeptical of policy, but setting forth history of "shibboleth of territoriality").

21. Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992).

22. *Id.* at 464-72.

statutes extraterritorially. My argument has two parts. First, I argue that concerns of constitutional structure support a territorial conception of state regulatory authority over state citizens' activities in sister states. Second, I maintain that the "duty of allegiance," which is sometimes thought to support such regulation, lacks support from the theories that generally underpin an obligation to obey the law.

II. THE ARGUMENT FOR TERRITORIALISM

Initially, the proposition that federal courts should limit a state's criminal or regulatory authority to actions within its own boundaries runs into the conventional wisdom of modern conflict of laws doctrine. Although the Supreme Court in *EEOC v. Arabian American Oil Co.*²³ (*Aramco*) articulated a presumption against extraterritoriality for federal statutes, Professor Larry Kramer has recently excoriated the *Aramco* court for adopting a "nineteenth century system" that functions in a "senseless fashion."²⁴ According to Kramer, "if anything is established" in modern conflict of laws thinking, "it is that across-the-board territoriality is a poor system for resolving conflicts."²⁵ To Kramer, *Aramco* is as "arbitrary" as a rule that American law would not apply when the events that give rise to the claim occurred on Monday, Tuesday, or Wednesday.²⁶

I am not a conflicts scholar, but to me, a claim that the location of the acts at issue is as irrelevant to the exercise of state authority as the day on which they take place seems excessive when applied to American citizens' actions in sister states. Within the American constitutional system, some persuasive things can be said for territoriality.²⁷ Unlike the international community, our polity is characterized by a

23. 111 S. Ct. 1227 (1991) (construing Title VII as not applying to employment discrimination outside of the borders of the United States).

24. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 212, 223.

25. *Id.* at 210-11. "The argument is simple: . . . it may make sense to apply a law to acts outside the state whenever the fact that these acts occurred outside the state is irrelevant to achieving the law's domestic objective." *Id.* at 211. I am not sure whether Kramer is inserting an escape hatch with the adjective *domestic*. Elsewhere, he seems to indicate that the issue is simply what the "aim of a law" is. *Id.*

26. *Id.* at 212. He does not, however, say that courts should always construe laws to apply extraterritorially, because "conflict with . . . the domestic law of another nation" may lead a court not to apply its own law. *Id.* at 211 n.123.

27. Professor Douglas Laycock has said many of them recently at a more general level. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992). The present article presents a sketch of concerns rather than a full-blown system of resolving conflicts of laws. Likewise, I leave aside arguments based on concerns of comity for the interests of sister states of the sort Professor Brilmayer articulates. See Lea Brilmayer, *Interstate Preemption: The Right To Travel, the Right To Life, and the Right To Die*, 91 MICH. L. REV. 873 (1993).

single overriding national citizenship that entails the right of citizens to travel and migrate between states, an entitlement of citizens to the "privileges and immunities of citizens" in the states they visit, and a history of territorially defined community authority.

A. *The Right To Travel*

Even before the framing of the Constitution, Article IV of the Articles of Confederation explicitly protected the right of the people of each state to "free ingress and regress to and from any other State."²⁸ Since the formation of the Union, the Constitution has likewise been thought to protect the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."²⁹ In the shadow of the challenge to the Union by state sovereignties during the Civil War, the Supreme Court in *Crandall v. Nevada* adopted the view that,

[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.³⁰

The right to travel has personal, as well as political value: it underpins our sense of liberty. Being tied to a locale is the essence of

28. ARTICLES OF CONFEDERATION art. IV (1777). Professor Bogen, in David Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 811-14 (1987), traces the right to "ingress and regress" back to the Magna Carta and intercolonial movement. The draft presented to the Continental Congress entitled inhabitants "going to reside in another State . . . to all the rights and privileges of the natural born free Citizens of the State [of their destination]." 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 889 (Worthington C. Ford ed., 1907); Bogen, *supra*, at 818-20. The Congress broadened the Article to protect the "privileges and immunities" of all "free inhabitants" in foreign states, ARTICLES OF CONFEDERATION art. IV (1777), not only those "going to reside." The right to travel as well as to emigrate has consistently been acknowledged since that time. See Kreimer, *supra* note 21, at 500-08.

29. *Corfield v. Coryell*, 6 F. Cas. 547, 552 (C.C.E.D. Pa. 1823) (No. 3230) (enumerating Article IV privileges and immunities); see *United States v. Wheeler*, 254 U.S. 281, 297-98 (1920) ("Undoubtedly the rights of citizens of the States to reside peacefully in, and to have free ingress into and egress from, the several States [against both their own and other states] . . . fused . . . into one [by Art. IV, § 2]."); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871) ("[T]he clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation . . ."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) ("[T]he Privileges and Immunities Clause] gives [citizens of each state] the right of free ingress into other States, and egress from them . . ."), *overruled on other grounds by United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). That this was the understanding among political actors as well is demonstrated in Kreimer, *supra* note 21, at 501-07.

30. *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting), quoted in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1868) (also noting that "the principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice in those cases"). I have advanced elsewhere the strong reasons to believe that the Citizenship Clause of the Fourteenth Amendment was adopted with a specific intent to secure the right of interstate travel. Kreimer, *supra* note 21, at 505.

serfdom.³¹ The right to travel allows us to widen our horizons by expanding the scope of our opportunities and insights. Travel also undermines parochial conformity, a fact that cannot have escaped either the founders of a nation established by dissenters fleeing persecution or the heirs of the abolitionist provocateurs who framed the Fourteenth Amendment.³² The right to travel provides us with the ability to experiment with modes of living other than those sanctioned at home and to return with the potentially transformative knowledge we have gained.³³

A system that allows states to truncate these experiments by allowing travel but punishing its object has the effect of undercutting this liberty. If the only way to escape from the force of a state's laws is to move to another state, we can expect increasing moral homogeneity in the state, as the most passionate or mobile dissenters relocate to

31. For accounts of how denials of freedom of movement have been used to perpetuate subjection in various repressive regimes, see, e.g., ROBERT E. JOHNSON, PEASANT AND PROLETARIAN 29-31 (1979) (serfs in Czarist Russia); Leon Boim, *The Passport System in the U.S.S.R., with Special Reference to the Status of Jews*, 2 REV. SOCIALIST L. 15 (1976) (internal passports in the Soviet Union); Sydney Kentridge, *The Theories and Realities of the Protection of Human Rights Under South African Law*, 56 TUL. L. REV. 227, 242-47 (1981) (South African laws restricting movement); Elizabeth S. Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71 YALE L.J. 1, 43-52 (1961) (South African Urban Areas Act); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 707 & n.28 (South African Pass Laws); Maimon Schwarzschild, *Variations on an Enigma: Law in Practice and Law on the Books in the USSR*, 99 HARV. L. REV. 685, 690-91 (1986) (book review) (internal passports in the Soviet Union).

The link between the right to travel and basic freedom was made clear in the aftermath of emancipation to framers of the Fourteenth Amendment. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull of Illinois, Chair of Judiciary Committee and draftsman of Civil Rights Act) ("[A] person who is a citizen in one State . . . is entitled to . . . the right to travel, to go where he pleases. . . . [A] law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman."); *id.* at 941-42 (Sen. Trumbull objecting to pass system in Texas by which a freedman found at large without a pass is whipped).

32. The Privileges and Immunities Clause of the Fourteenth Amendment was adopted amid references to the experience of Rep. Samuel Hoar of Massachusetts, a cause célèbre at the time in abolitionist circles. In 1844, Representative Hoar arrived in South Carolina to challenge that state's laws forbidding the entry of black seamen. He was driven out of the state by threats of violence with the connivance of state authorities, a result widely viewed by congressional Republicans as a violation of his rights as a national citizen. See Kreimer, *supra* note 21, at 506. Professor Amar has argued that the abolitionist heritage of the Fourteenth Amendment embodies a particular concern with "cultural outsider[s] who[] . . . challenged head on the social order and general orthodoxy." Akhil R. Amar, *The Supreme Court, 1991 Term — Comment: The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 152-53 (1992); see also Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1272-74 (1992).

33. Of course, not every exercise of the right to travel is a potentially transformative exercise of moral choice. The nature of the federal union protects the right to travel to avoid excise taxes as well as the right to travel to have abortions. Cf. *infra* text accompanying notes 92-96. The case of moral dissensus, however, presents particularly pressing reasons exist to regard extraterritorial regulation as problematic, both because of its tendency to impose parochial limitations and because of the moral force of other regimes. Cf. *infra* text accompanying notes 77-81.

other jurisdictions. The aspect of our tradition that values diversity and experimentation, both for their own sake and as bulwarks against tyranny, would see this homogenization as a substantial cost.³⁴

If citizens were presumed to be subject everywhere to the criminal laws of their home states, the price of travel within the United States would be subjection to a double dose of moral demands. Upon crossing the border a state citizen would remain subject to the moral demands of her home state while also taking up the demands of the state that she visits. With respect to most laws, the double demands are congruent; when I travel from Pennsylvania to California, if I am bound by both states' prohibitions against murder, robbery, and arson, my freedom of action is subject to little additional constraint. However, where the basic moral commitments of the states differ, a system that provides for the continuation of home state control will mean that interstate travel subjects the traveler to the restrictions of both regimes. In a culture that values freedom, this is a cost; it is also a disincentive to interstate travel. In a nation whose citizenship entails a right to travel among the states, premised in part on the power of interstate travel to forge a single nation, such disincentives to interstate travel should be minimized.

Neither legislative nor judicial action by the states is likely to mitigate the disincentive to travel that criminal prohibitions produce, as it might in the case of civil obligations. In a civil context the situs state might conceivably allow the visitor to be governed by her home state rules, whether more lenient or more restrictive. California might well decide for reasons of comity that, when I visit, the contracts I make with other Pennsylvanians should be governed by Pennsylvania law. In a criminal context, however, the state's obligation to maintain order within its boundaries precludes such an outcome. California would never allow me to assist another Pennsylvanian's suicide in violation of California law simply because similar conduct would be legal at home.

But the problem is worse still. In the civil case, even if California declines to defer to Pennsylvania law, I can often at least fix my obligations to a single standard, assuming that I can obtain jurisdiction over the individuals with whom I interact in California. Once I have a

34. See THE FEDERALIST No. 10, at 22 (James Madison) (Roy P. Fairchild ed., 1981): The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens

Just as extending the scope of the republic promotes a diversity of interests, which guards against tyrannical triumph of any single interest, structures which inhibit moral pluralism within a single state pose an increased danger of the triumph of faction.

California judgment of my civil obligations, the Full Faith and Credit Clause obligates Pennsylvania to abide by that judgment. By contrast, in the criminal case the prevailing dual sovereignty theory holds that a single series of actions may be separately punishable offenses under the criminal laws of two sovereigns, and hence that Pennsylvania would be fully within its rights in punishing me even if California has acquitted me.³⁵

B. *Equal Privileges and Immunities*

The United States is not a league of separate sovereigns; it is a single nation. This fact has implications beyond the right to travel. One of the means of establishing national unity embedded in our Constitution has been the entitlement of citizens of individual states to interact with one another as equal members of a common nation. When I enter California, I do so as an American citizen, not as a Pennsylvanian; I show no passport at the border, and I am subject to no special disabilities upon my entrance.³⁶ This is not a matter of grace, like the lenient treatment I receive when entering Canada. Rather, it is my right as a citizen of the United States to be treated with the same respect shown to native Californians. The status of citizenship in American states has from the formation of the Constitution "entitled" citizens to this treatment by virtue of the Privileges and Immunities Clause of Article IV of the Constitution.³⁷ When American citizens travel "in the several states," as is their right, they are "entitled" to the privileges and immunities of local citizens.³⁸

35. *Heath v. Alabama*, 474 U.S. 82 (1985). *Heath* upheld Alabama's effort to punish a kidnapping-murder that began in Alabama and ended in Georgia, despite the fact that Georgia had already prosecuted and exacted punishment for the crime. Justice O'Connor's "dual sovereignty analysis" recognized Alabama's "interest in vindicating its sovereign authority," 474 U.S. at 93, although Georgia had already punished the crime.

Heath, however, does not contemplate punishment for wholly extraterritorial actions. Alabama's "sovereign interest" arose by virtue of the crime's commencement in Alabama, not by virtue of the defendant's Alabama citizenship. 474 U.S. at 93. Indeed, the defendant would not have been convicted if the defense had succeeded in its argument that the kidnapping did not in fact begin in Alabama. See 474 U.S. at 85.

I have argued elsewhere that an effort to criminalize the mere departure to obtain an abortion would be an impermissible interference with the right to travel. See Kreimer, *supra* note 21, at 508 n.194.

36. *Cf., e.g., Edwards v. California*, 314 U.S. 160 (1941) (invalidating California statute which prohibited assisting the immigration of indigents); *Green v. Anderson*, No. Civ. S-92-2118, 1993 U.S. Dist. LEXIS 802, at *16 (E.D. Cal. Jan. 28, 1993) (invalidating California's lower welfare payments for recent immigrants).

37. U.S. CONST. art. IV, § 2, cl. 1.

38. Mark P. Gergen, *The Selfish State and the Market*, 66 TEXAS L. REV. 1097, 1118-28 (1988), maintains that Article IV is concerned only with economic rights. This seems to me a misreading of the history and construction of the clause. As I see it, his interpretation faces three difficulties.

First, Article IV of the Articles of Confederation contained two sets of protections: the right

As the modern Court has articulated it, "the primary purpose of [the Privileges and Immunities Clause] . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."³⁹ Historically, the goal was not simply to avoid interstate friction but to further a sense of national unity among the individual citizens who comprised the "people" of the Republic.⁴⁰ Thus, home states cannot waive the Article IV

of "free inhabitants of each of these States . . . to all the privileges and immunities of free citizens in the several States," and the right of "the people of each State . . . [to] enjoy [in other states] all the privileges of trade and commerce." ARTICLES OF CONFEDERATION art. IV (1777). The broader language, without the commerce limitation, is what the Constitution adopted. The text of the Privileges and Immunities Clause has no limitation of the sort that Gergen suggests.

Second, precedent does not reflect such a limitation. Several cases over the years have referred to privileges and immunities of a noncommercial nature. Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230), includes the right of habeas corpus. Several early cases include access to the courts. *E.g.*, *Blake v. McClung*, 172 U.S. 239, 256 (1898). *United States v. Wheeler*, 254 U.S. 281, 293 (1921), seems to include the right to reside. Most recently, Justice O'Connor in *Zobel v. Williams*, 457 U.S. 55, 73-81 (1982) (O'Connor, J., concurring), relies on the clause as a ground for striking down the Alaska oil bonus to all citizens. Moreover, as I demonstrate in Kreimer, *supra* note 21, during the antebellum period both the political and judicial branches seemed to think that Article IV included a right to interstate travel and migration for any purpose. *Id.* at 501-06.

Third, while in *Baldwin v. Fish & Game Commn.*, 436 U.S. 371 (1978), Justice Blackmun refers to the protected activities as those "basic to the livelihood of the Nation," he also refers to those that are "basic to the maintenance or well-being of the Union," 436 U.S. at 388, those that are "basic and essential," 436 U.S. at 387, and those "bearing upon the vitality of the Nation as a single entity." 436 U.S. at 383. More directly on point, Justice Powell in *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 n.11 (1985), expressly rejects a claim that only commercial activities are protected, commenting that "[t]he Court has never held that the Privileges and Immunities Clause protects only economic interests" and citing *Doe v. Bolton*, 410 U.S. 179 (1973) (protecting the right of out-of-state residents to obtain abortions).

The other technical objection to the privileges-and-immunities theory is that the clause is often said to apply only against foreign states, and not against home states. I address this objection in Kreimer, *supra* note 21, at 514-19.

39. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). This passage is quoted with approval in *Zobel*, 457 U.S. at 74 (O'Connor, J., concurring); *United Bldg. & Constr. Trades v. Mayor of Camden*, 465 U.S. 208, 216 (1984); *Piper*, 470 U.S. at 279-80; and *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988).

40. The Court set the course for future interpretation in articulating Article IV's role in the federal system with the memory of the struggle for Union raw in the national consciousness.

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; . . . it insures to them in other States the same freedom possessed by the citizens of those States *It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.*

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (emphasis added; footnote omitted). This passage was quoted with approval in *Friedman*, 487 U.S. at 64; *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978); *Baldwin v. Fish & Game Commn.*, 436 U.S. 371, 380-81 (1978); *United States v. Wheeler*, 254 U.S. 281, 295 (1920); and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78 (1920).

rights of their citizens when the states regard those rights as unnecessary to guard against interstate friction;⁴¹ rather, the citizens as individuals are "entitled" to local privileges and immunities when they visit neighboring states. As citizens from different states travel and interact on a basis of equality, they develop and maintain consciousness of themselves as equals and members of a single polity.

By contrast, a system in which my opportunities upon entering California remain subject to the moral demands of Pennsylvania undercuts this sense of national unity. Such a system would deny to me, because of my status as Pennsylvanian, the privileges that the Californians I pass on the street share as their birthright. This situation hardly advances the goal of establishing a single national identity.

One might, of course, claim that, in remaining subject to Pennsylvania law, I achieve equality of a different sort with the Californians: we are each equally bound by *the law of our home state*.⁴² This claim encounters three difficulties. First, in the criminal context, the premise that each citizen will be equally subject to the laws of her home state is inaccurate. No state is willing to give me the full benefits of the law of my home state. While the Californians I pass on the street are not bound by the law of Pennsylvania, California's obligation to keep order within its own boundaries will not allow it to grant me an exemption from local criminal law on the ground that I am bound by the law of Pennsylvania.⁴³ Thus, in the criminal context, a

41. In *Austin v. New Hampshire*, 420 U.S. 656, 668 (1975), New Hampshire sought to deflect an attack under the Privileges and Immunities Clause on the ground that the home state could remove New Hampshire's discriminatory tax on nonresidents' income by imposing its own taxes. The court held that under the Privileges and Immunities Clause "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State." Thus, the status of the home state's antiabortion policy would not dilute the entitlement of out-of-state visitors to obtain abortions on a basis of equality with domestic residents. See also *Travis*, 252 U.S. at 82 ("A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States."), quoted in *Austin*, 420 U.S. at 667 (approving the *Travis* reasoning).

42. Cf. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 505-06, 572 (1963) (discussing problems with the position that a nonresident's rights are everywhere determined by the law of her home state); John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 190, 211 (1981) (flirting with the proposition that "the apparent central purpose of the Privileges and Immunities Clause is served so long as everyone is accorded the benefits of his or her home state's law").

43. The example of Somalia suggests that Hobbes was at least partially right: the bare minimum obligation of government is to enforce norms that protect life and liberty within its own boundaries. In theory, a state might enforce different norms against locals and visitors within the state. However, if criminal law imports moral condemnation, for a state to permit morally blameworthy activities within its jurisdiction simply on the basis of the citizenship of the protagonists would be, to say the least, odd.

In practice, such an abdication of local norms would deny locals interacting with foreigners the protection that their home state has determined to be morally required. No state does this, nor could one. Moreover, the requirement of a jury trial in criminal cases renders such a pros-

"personal law" regime will inevitably put the visitor at a disadvantage compared to the native.⁴⁴

Second, the equality that the Privileges and Immunities Clause seeks to foster is one that affirmatively advances national unity, not one that simply avoids invidious discrimination against individual citizens. The "entitlement" of Article IV is constitutive of the nation as well as protective of the individual. The equality of a "personal law" regime emphasizes the differences between individuals as citizens of different states rather than their commonalities. It undercuts rather than fosters common national citizenship.

The third difficulty recognizes that the Privileges and Immunities Clause not only fosters national unity and inhibits parochial discrimination, but also imparts to individual American citizens the freedom that accompanies national citizenship. The predecessor of the Privileges and Immunities Clause in Article IV of the Articles of Confederation explicitly protected the "right of ingress and regress," and the Framers both of the Constitution and of the Fourteenth Amendment clearly understood the Privileges and Immunities Clause to recognize similar rights.⁴⁵ One of the reasons for interstate travel was the desire to take advantage of local opportunities in other states. A system of personal law that empowered the home state to permit travel but to deny its object would undercut this liberty of movement just as surely as would a refusal on the part of the host state to allow newcomers to take advantage of the local laws. Indeed, the ability of a home state to forbid its citizens to take advantage of opportunities legal in other states would impinge on the other heritage of Article IV of the Articles of Confederation: the right under the Commerce Clause to take

pect anomalous in the extreme. The concept that a jury, selected to represent the "community's conscience," would apply a norm rooted in the conscience of another community is self-contradictory. Nor could a state avoid the problem by remitting offenders for trial to their home states. Relying on the government of the sister state to enforce order within the state is entirely at odds with the American Constitution: when the local government requires outside help to control domestic violence, the *federal* government is responsible for providing it. See U.S. CONST. art. IV, § 4.

44. This is, of course, a general criticism of Brainerd Currie's "interest analysis" of conflicts. See, e.g., Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 320-24 (1987) ("[D]enying [nonresident defendants] the benefits of forum law puts them at an unfair disadvantage."); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 413 (1987) (arguing that Currie's choice of law is discriminatory because the "outsider bears all of the burdens of local law, but is not entitled to its application when that would be beneficial") [hereinafter Brilmayer, *Shaping and Sharing*]; Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 416-17 (1980) (arguing that interest analysis "seems directly contrary to the spirit of the privileges and immunities clause and the equal protection clause") [hereinafter Brilmayer, *Interest Analysis*].

45. Kreimer, *supra* note 21, at 500-06.

advantage of the national market of goods and services offered within the "area of trade free from interference by the States."⁴⁶

C. *The Nature of the Union*

In the international arena, nations have occasionally claimed the right to control the extraterritorial actions of their citizens. British impressment of American seamen on the basis of claims about the indissoluble bonds of allegiance of former British subjects was one of the precipitating factors of the War of 1812. American thinking extended jurisdiction based both on claims of allegiance⁴⁷ and on "the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries . . . for the trial of their own subjects or citizens for offences committed in those countries."⁴⁸

The tradition of allowing the states that constitute our nation to exercise control over the conduct of their citizens in sister states is much more tenuous. State courts from the founding of the Republic through the framing of the Fourteenth Amendment denied the power of states to prosecute for wholly extraterritorial acts, and a majority of

46. *American Trucking Assns. v. Scheiner*, 483 U.S. 266, 280 (1987) (quoting *Boston Stock Exch. v. State Tax Commn.*, 429 U.S. 318, 328 (1977)); see *Dennis v. Higgins*, 111 S. Ct. 865, 871 (1991) ("Commerce Clause . . . confer[s] a 'right' to engage in interstate trade free from restrictive state regulation."); *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . [and] every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.").

A modern strain of Commerce Clause doctrine prohibits efforts by states to regulate extraterritorial commerce directly. In *Healy v. Beer Inst.*, 491 U.S. 324 (1989), a majority of the Court relied on *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), for the proposition that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" 491 U.S. at 336 (quoting *MITE*, 457 U.S. at 642-43); see also 491 U.S. at 336 n.13 ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would . . . exceed the inherent limits of the State's power.") (quoting *MITE*, 457 U.S. at 643 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977))); 491 U.S. at 333 n.9 (*MITE* "significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation"). The *Healy* Court invalidated Connecticut's efforts to link the price of beer that interstate brewers sold within Connecticut to the prices that those brewers charged in neighboring states. See Kreimer, *supra* note 21, at 493-94.

47. See *Kawakita v. United States*, 343 U.S. 717, 733 (1952) (because territorial definition of treason was rejected by the Constitutional Convention, the Court "reject[s] the suggestion that an American citizen living beyond the territorial limits of the United States may not commit treason against them" and notes that "[o]ne who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting," giving taxes and military service as examples); *Blackmer v. United States*, 284 U.S. 421 (1932) (affirming the obligation of expatriate American citizen to return and testify in court). For recent discussion of American exercise of nationality jurisdiction in the international arena, see, for example, Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992); Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

48. *In re Ross*, 140 U.S. 453, 462 (1891).

states today have state constitutional requirements that constrain criminal prosecutions of wholly extraterritorial offenses.⁴⁹ The Model Penal Code presumes in most circumstances that criminal jurisdiction must be predicated on the occurrence of conduct or direct and intended consequences within the prosecuting state.⁵⁰

The American Constitution acknowledges exclusive state sovereignty over conduct within the territories defined by state borders. Many aspects of the constitutional structure would make no sense otherwise. The understanding that a citizen of one state who ventured into another state would be bound by the local law was the premise for the adoption of Article IV's Privileges and Immunities Clause; the clause was necessary to guarantee that the host would not use its exclusive power to the detriment of visitors from other states in the Union. The Extradition Clause of Article IV provides that an accused who flees from the state where a crime is committed must be "delivered up to be removed to the State having Jurisdiction of the Crime"; it acknowledges that the sole responsibility and prerogative for punishment rests with the state within which the crime occurred.⁵¹

The Constitution affords federal guarantees for the territorial in-

49. I use the term *wholly extraterritorial* advisedly. The Court has generally recognized, at least since the beginning of this century, that states are entitled to punish "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it." *Ford v. United States*, 273 U.S. 593, 620 (1927) (quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911)); see also MODEL PENAL CODE § 1.03(1)(a) ("result occurs in the state").

For discussion of state court practice for the first hundred years of the Republic, see Kreimer, *supra* note 21, at 464-72. State vicinage provisions that effectively limit the ability to prosecute wholly extraterritorial crimes exist in at least 29 jurisdictions. See George, *supra* note 20, at 631; cf. John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1081 (1983) (counting 35 such provisions).

50. MODEL PENAL CODE § 1.03 (Proposed Official Draft 1962); see *id.* cmt. 1:

So long as sovereignties are spatially defined, their reciprocal interests imply, at least in general, a limitation of their regulatory goals to influencing what occurs within their borders. Such a limitation . . . yields some safeguard against the unfair condemnation of conduct that is approved or tolerated by the community in which the acts involved occurred.

The exceptions provided by the Model Penal Code are § 1.03(1)(e) (omission of a performance of a legal duty with respect to some person or thing within the state) and § 1.03(1)(f) ("a statute of this State that expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State.").

Twenty-nine states have adopted versions of the Model Penal Code. § 1.03 cmt. 1. Of these, only 12 have adopted the "express exception" provision. *Id.* cmt. 6.

51. U.S. CONST. art. IV, § 2, cl. 2; cf. Letter of James Madison to Edmund Randolph (Mar. 10, 1784), reprinted in 4 THE FOUNDERS' CONSTITUTION 517 (Phillip B. Kurland & Ralph Lerner eds., 1987) ("Unless Citizens of one State transgressing within the pale of another be given up to be punished by the latter, they cannot be punished at all . . ."). Madison was discussing the demand by South Carolina that Virginia extradite a Virginia citizen for an assault in South Carolina. His assumption was that Virginia would have no authority to punish its citizens for extraterritorial wrongs.

Professor Laycock argues forcefully that, as a matter of constitutional law, "[s]tate authority is in fact divided territorially. . . . State boundaries do what ordinary citizens think they do: divide the authority of separate sovereigns." Laycock, *supra* note 27, at 320. As well as relying on political thought of the Framers and their opponents, he observes that the prohibition in Art.

tegrity of the states against encroachment by their neighbors, against invasion, and, upon their request, against "domestic Violence."⁵² In the absence of such a request, responsibility for ensuring "domestic tranquility" rests with the state within whose territory the allegedly wrongful act or consequence occurs.⁵³ Indeed, the combination of power and responsibility for ensuring order within their territories provides the firmest basis for the states' claims to obedience to their laws. Where this responsibility is absent, the authority to demand obedience is correspondingly diminished. Unlike the United States' diplomatic responsibility to provide for my protection when I visit Mexico, Pennsylvania has no similar responsibility — or capacity — to ensure my protection, whether by direct intervention or by threat of war, when I visit California. When I enter California, I pass into the care of California, guaranteed to me by the Privileges and Immunities Clause.

The understanding of the scope of legitimate criminal jurisdiction is further illuminated by the colonial claim that British efforts to "depriv[e] us in many cases, of the benefits of Trial by Jury" and "transport[] us beyond Seas to be tried for pretended offenses"⁵⁴ constituted grounds for revolution.⁵⁵ The guaranty of a jury local to the

IV, § 3, cl. 1 against forming new states "within the Jurisdiction of any other State" equates jurisdiction with territory. *Id.* at 317.

52. U.S. CONST. art. IV, §§ 3, 4.

53. *Cf. Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (relying on the "historic right and obligation of the States to maintain peace and order within their confines"), *quoted in Heath v. Alabama*, 474 U.S. 82, 93 (1986).

54. THE DECLARATION OF INDEPENDENCE paras. 20-21 (U.S. 1776); *see also Duncan v. Louisiana*, 391 U.S. 145, 152 (1968).

55. At common law, a crime could be prosecuted only before a jury from the county in which the crime occurred. *See William W. Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 64-65 (1944); Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (1976). British threats in 1769 to extradite colonials from Massachusetts for trial in England drew immediate and unanimous outrage from colonial legislatures as "highly derogatory of the rights of *British* subjects; as thereby the inestimable Privilege of being tried by a Jury from the Vicinage . . . will be taken away . . ." JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA 1766-1769, at 214 (John Pendleton Kennedy ed., 1906); *see also Blume, supra*, at 64; Kershen, *supra*. In 1774 the Continental Congress asserted the "great and inestimable privilege of being tried by their peers of the vicinage" and claimed that the British practice of indicting "in any shire or county within the realm" deprived Americans of "a constitutional trial by jury of the vicinage." CONTINENTAL CONGRESS, DECLARATION AND RESOLVES (Oct. 14, 1774), *reprinted in 5 THE FOUNDERS' CONSTITUTION, supra* note 51, at 258.

According to Madison, the "uniformity of trial by Juries of the vicinage" among the states was what made extradition under the Articles of Confederation to the place where the crime occurred palatable:

The transportation to G[reat] B[ritain] seems to have been reprobated on very different grounds: it would have deprived the accused of the privilege of trial by jury of the vicinage . . . and have exposed him to trial in a place where he was not even alleged to have ever made himself obnoxious to it . . .

Letter of James Madison to Edmund Randolph (Mar. 10, 1784), *reprinted in 4 THE FOUNDERS' CONSTITUTION, supra* note 51, at 517.

site of the alleged crime was embodied in Article III's requirement that for federal offenses "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."⁵⁶ In an era when "juries rather than judges spoke the last word on law enforcement because the juries possessed power to determine all issues of law or fact that came before them,"⁵⁷ the guaranty of a jury of the vicinage in criminal cases included in the Sixth Amendment⁵⁸ was clearly in its origins what it is only implicitly today: not only a procedural protection but a choice of law provision protecting citizens against extraterritorial control.

III. THE ARGUMENT FROM ALLEGIANCE

The proponents of a personal abortion law that women carry with them upon leaving their home states need not rest on the claim that territorial law is arbitrary. Even if reasons exist to limit state regulatory authority to its own boundaries, countervailing considerations may apply when the state seeks to regulate the actions of its own citizens extraterritorially.⁵⁹

A state with a restrictive twenty-four hour waiting period, such as Mississippi, could defend such regulation on the ground that a citizen of Mississippi, by virtue of her citizenship, owes a duty of obedience to Mississippi's laws even outside its boundaries. Mississippi could point to the holding in *Blackmer v. United States*⁶⁰ that an American citizen abroad "continued to owe allegiance to the United States," and "[b]y

56. U.S. CONST. art. III, § 2, cl. 3. Article III also provides for cases in which the federal crime is committed outside of state territory. This may either simply indicate that the Framers contemplated that the United States would hold sovereignty over territory not within any state, or that the nation, unlike the states, could expect to exercise extraterritorial jurisdiction.

57. William E. Nelson, *The Eighteenth Century Constitution as a Basis for Protecting Liberty*, in WILLIAM E. NELSON & ROBERT C. PALMER, *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 15, 19 (1987). Nelson continues:

The absence of armies, police forces, and bureaucracies and the ultimate power of juries over the substance of the law reveals much about the governance of eighteenth-century America. Colonial governments were unable to impose law on recalcitrant minorities by force; they had to govern through law that was acceptable to the broad base of white, male, landowning, and taxpaying citizens from whom jurors were randomly drawn.

Id.

58. Anti-Federalist fears "that Article III's provision failed to preserve the common-law right to be tried by a 'jury of the vicinage' . . . furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments." *Williams v. Florida*, 399 U.S. 78, 93-94 (1970). The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

59. Although to my knowledge no state has made the women who obtain abortions in violation of its restrictions directly liable, potential liability could arise from a woman's status as conspirator or accessory.

60. 284 U.S. 421 (1932).

virtue of the obligations of citizenship, . . . he was bound by its laws made applicable to him in a foreign country.”⁶¹ Quoting *Skiriotes v. Florida*,⁶² Mississippi could maintain that,

[i]f the United States may control the conduct of its citizens upon the high seas, we see no reason why the State . . . may not likewise govern the conduct of its citizens Save for the powers committed by the Constitution to the Union, the State . . . has retained the status of a sovereign.⁶³

Moreover, relying on Professor Korn, it could claim the sanction of the

social contract, whereby one assents to cast his lot with others in accepting the burdens as well as the benefits of identification with a particular community, and . . . cedes to its lawmaking agencies the authority to make judgments . . . striking the balance between his private substantive interests and competing ones of other members of the community.⁶⁴

Such arguments, however, would rest on a concept of state citizenship that is not borne out by the cases from which the quotations are taken, and a concept of the duty to obey the home state law that does not follow from the usual philosophical defenses of the duty of allegiance. At the level of case law, *Blackmer* is a case involving federal, not state, power; furthermore, it endorsed the canon of statutory construction by which “legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States.”⁶⁵ *Skiriotes* is specifically limited to state prosecution of crimes “within no other territorial jurisdiction.”⁶⁶ In the abortion area, the Supreme Court’s opinion in *Bigelow v. Virginia* was premised on the proposition that Virginia could not constitutionally regulate abortions performed in New York.⁶⁷

61. 284 U.S. at 436.

62. 313 U.S. 69 (1941).

63. 313 U.S. at 77.

64. Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 799 (1983). Professor Brilmayer has been prolific in advancing the concept that application of law must be justified by a political theory of obligation. See, e.g., LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989) [hereinafter BRILMAYER, JUSTIFYING INTERNATIONAL ACTS]; Brilmayer, *Shaping and Sharing*, *supra* note 44; Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277, 1294 (1989) (“Choice of law rights arise out of the fact that the state’s legitimate authority is finite and the state ought to recognize this. A state is entitled to coerce because it has satisfied the standards of political legitimacy that define the situations in which state coercion is proper.”) (footnote omitted) [hereinafter Brilmayer, *Rights, Fairness and Choice of Law*]. She has been somewhat skeptical that any of the relevant theories justify coercion. See BRILMAYER, JUSTIFYING INTERNATIONAL ACTS, *supra*, at 52-78; Lea Brilmayer, *Consent, Contact and Territory*, 74 MINN. L. REV. 1 (1989).

65. *Blackmer*, 284 U.S. at 437.

66. 313 U.S. at 78; see 313 U.S. at 77 (high seas).

67. 421 U.S. 809 (1975). *Bigelow* reversed the conviction of a Virginia newspaper for advertising abortion referral services in New York. The seven-member majority stated that the Vir-

With respect to the duty of allegiance, the argument passes far too quickly from the fact of citizenship to the duty of extraterritorial obedience. In fact, the major plausible theories that support a duty of obedience to the law as normatively desirable either equivocate with regard to extraterritorial enforcement⁶⁸ or suggest that in our system such extraterritorial duties are themselves unjustified.⁶⁹

A. *Consent and Its Cousins*

1. *Actual and Tacit Consent*

The progenitor of the claim that a "social contract" obligates citizens to obey the laws of their polity is, of course, John Locke. Beginning with the proposition that nothing can put a person "into

ginia legislature "obviously could not have proscribed the activity" in New York, and could not have prosecuted its residents for traveling to New York and obtaining the services because "Virginia possessed no authority to regulate the services provided in New York." 421 U.S. at 823-24.

It will not do to say that this aspect of *Bigelow* was dictum. In *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345 (1986), Justice Rehnquist distinguished *Bigelow* from a limitation on advertising for domestic gambling on the ground that, in *Bigelow* "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not be prohibited by the State."

As the *Bigelow* Court observed, the underlying for-profit referral services at issue in *Bigelow* were subsequently declared illegal by New York and were not themselves constitutionally protected against domestic regulation. *Bigelow*, 421 U.S. at 822 n.8, 827. The only "constitutional protection" that distinguishes *Bigelow* is the protection against extraterritorial regulation of conduct legal where it occurs. *Cf. Nielson v. Oregon*, 212 U.S. 315 (1909):

Where an act is *malum in se* prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute . . . [but where] the opinion of the legislatures of the two States is different . . . the one State cannot enforce its opinion against that of the other, at least as to an act done within the limits of that other state.

212 U.S. at 320-21.

Justice Rehnquist, of course, dissented from *Bigelow*, calling its territorial limitation unjustified and "at war with our prior cases," 421 U.S. at 835 n.2, and in all probability he stands ready to reverse *Bigelow* on the merits. *Cf. Payne v. Tennessee*, 111 S. Ct. 2597, 2609-11 (1991) (Rehnquist, C.J.) (stare decisis is less compelling in constitutional than in statutory cases). It is always possible that, if faced with extraterritorial limitations that it regards as "reasonable," a Supreme Court majority will repent of the regard for stare decisis manifested by the plurality in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

68. The equivocal implications of the usual theories come as no surprise to political scientists. *E.g.*, ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989):

Although claims about the domain and scope of authority clearly rest on value judgments of some kind, what immediately strikes the eye when we examine specific claims is how much a reasonable solution will necessarily depend on concrete circumstances. . . .

Once again one might well wonder whether the problem admits of a general solution or indeed whether general principles can have any bearing at all on feasible solutions.

Id. at 195.

69. This leaves aside the possibility, adopted for example by MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 105-14 (1988) and A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979), that there is no prima facie obligation to obey law as such. Obviously, if a state cannot morally demand obedience to its law, outside of the moral merits of the law itself, in morally contested areas of conflict of laws, the fact of allegiance imports no obligation.

subjection to any earthly power but only his own consent,"⁷⁰ Locke asserted an obligation to obey grounded alternatively on express consent and tacit consent. One who "has once by actual agreement and any express declaration given his consent to be of any commonweal is perpetually and indispensably obliged to be and remain unalterably a subject to it."⁷¹ In addition,

every man that hath any possession or enjoyment of any part of the dominions of any government doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government during such enjoyment as any one under it; whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and in effect it reaches as far as the very being of any one within the territories of that government.⁷²

Locke's intellectual heirs widely concede that little in contemporary society resembles an express consent to obey perpetually all of the laws of the states in which we live.⁷³ Lacking express undertakings, the Lockean argument must rest on tacit consent. However, as doubters since Hume have pointed out, residence or enjoyment of local benefits is a weak basis on which to rest a claim of tacit consent, at least if tacit consent is understood as voluntary acquiescence. In the first place, the nature of the obligations consented to must be understood by the party who consents. If I am right that the tradition of America's system has been that the right to impose criminal punishment is territorially limited, then the consent of residents in a system of universal justice is consent only to that territorially limited sovereignty.⁷⁴

70. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* ¶ 119, at 60 (J.W. Gough ed., 1947) (6th ed. 1764).

71. *Id.* ¶ 121, at 61.

72. *Id.* ¶ 119, at 60; cf. PLATO, *CRITO*, at *51d-e ("[I]f any one of you stand his ground when he can see how we administer justice . . . we hold that by doing so he has in fact undertaken to do anything that we tell him.").

73. See, e.g., KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 69-70 (1987); GEORGE KLOSKO, *THE PRINCIPLE OF FAIRNESS AND POLITICAL OBLIGATION* 142-43 (1992); SIMMONS, *supra* note 69, at 79-80 ("The paucity of express consentors is painfully apparent."). In addition to the lack of express undertakings, the American concept of citizenship diverges substantially from Locke's. Founded as it is on emigration from other countries, the United States has long taken the position that the right to alter one's status by expatriation is an "inherent and fundamental right." JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 267-70 (1978); PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT* 54-57 (1985) (discussing in particular the impressment controversy).

The clarification of citizenship in the aftermath of the Civil War brought an explicit recognition by Congress in 1868 that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." KETTNER, *supra*, at 344; SCHUCK & SMITH, *supra*, at 62. The establishment by the Fourteenth Amendment of a national rule that ascribed state citizenship to residence in a state embodied this conclusion in our fundamental law.

74. Hume goes one step further, arguing that

In the second place, the voluntariness of such tacit consent is always at issue. When an impoverished woman in Mississippi declines the opportunity to escape Mississippi citizenship by abandoning her family, friends, community, and job, does she thereby "voluntarily" consent to application of Mississippi's law, or does she only bow to necessity? As Hume initially put the objection, "[w]e may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her."⁷⁵ Territorially limited obligations have at least a marginal advantage on this score. If one can leave the state reasonably easily to do the forbidden act, and then return, the claim that by failing to leave one has consented to the application of the prohibition gains at least some force.⁷⁶

implied consent can only have place where a man imagines that the matter depends on his choice. But where he thinks — as all mankind do who are born under established governments — that by his birth he owes allegiance to a certain prince or certain form of government, it would be absurd to infer a consent or choice, which he expressly in this case renounces and disclaims.

DAVID HUME, *Of The Original Contract*, in HUME'S MORAL AND POLITICAL PHILOSOPHY 356, 363 (Henry Aiken ed., 1948). In the United States, the fact that state citizenship legally follows residency means that most Americans believe that they have a choice as to their state citizenship. Hume's argument is thus inapplicable in its pure form to state citizenship.

75. *Id.* For some later versions, see RONALD DWORKIN, *LAW'S EMPIRE* 192-93 (1986) ("[N]o one can argue that very long with a straight face. Consent cannot be binding on people, in the way this argument requires, unless it is given more freely, and with more genuine alternate choice, than just by declining to build a life from nothing under a foreign flag."); RUTH W. GRANT, *JOHN LOCKE'S LIBERALISM* 126 (1987) ("There is a general dilemma in the effort to specify what constitutes consent. If the criteria are 'strong' . . . consent theory is likely to be morally satisfying but practically problematic. . . . If the criteria are 'weak' . . . consent theory provides a practical criterion . . . but one that blunts the point of [Locke's moral] claim . . ."); GREENAWALT, *supra* note 73, at 73 ("People stay in homelands because of language, culture, job, friends, and family; their inertia hardly indicates approval or acceptance of government and laws.") (footnote omitted); DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 183 (1989) ("Skeptical objections come fast and furious, only some of them with a nod to Hume. . . . Maybe [residence] signifies apathy; maybe it signifies lack of alternatives. . . . Subjection to the government, much as I dislike . . . it, might be something I'm grudgingly willing to put up with as the onerous price tag attached to staying.") [hereinafter HERZOG, *HAPPY SLAVES*]; DON HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* 80 (1985) ("Talk of consent immediately invites cynical sneers . . . : suitably stretched and redescribed with loving philosophical care, anything we do can count as consent.") [hereinafter HERZOG, *WITHOUT FOUNDATIONS*]; KLOSKO, *supra* note 73, at 143 ("If consent is reduced to residence, or even to one's mere presence in a country, then voluntary consent has lost its point."); CAROLE PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION: A CRITIQUE OF LIBERAL THEORY* 72-73 (1985); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 80-94 (1986); SIMMONS, *supra* note 69, at 99 ("The problem is that it is precisely the most valuable 'possessions' a man has that are often tied necessarily to his country of residence and cannot be taken from it."); BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS*, *supra* note 64, at 62, argues that any residual force in the tacit consent from residency argument is parasitic on an undefended assumption that states indeed have legitimate power within their own boundaries.

76. Whether women really have live options to exit to obtain abortions will depend on their life circumstances. Before *Roe v. Wade*, the poorest, youngest, least informed, most dependent, and most vulnerable women were least likely to find travel a live option. See, e.g., Carole Joffe, *Physician Provision of Abortion Before Roe v. Wade*, 9 RES. SOC. HEALTH CARE 21, 28-30 (1991) (finding abortions before *Roe* more available to women with resources or contacts; poor, young

2. *Hypothetical Consent and Just Institutions*

A first alternative gloss on Locke suggests that the consent at issue is not the constrained or unconstrained actions of actual individuals, but the hypothetical consent of the original contract entered into by the founders of the commonwealth. If a government meets the terms of such a legitimate original contract, it has a claim to obedience.⁷⁷ Joseph Raz has recently written that, "if there is a common theme to liberal political theorizing on authority it is that the legitimacy of authority rests on the duty to support and uphold just institutions."⁷⁸ In the case of extraterritorial abortion, however, this duty is indeterminate. First, the obligation to "support" just institutions does not carry any necessary implications as to the geographical scope of the duty.⁷⁹ It is entirely consistent with the proposition that, as long as I do not actively seek to undermine the just institutions of my home state — as by committing treason or shooting a cannon into its territory or discharging noxious fumes across its border — my obligation to "sup-

and minority women disproportionately vulnerable); James D. Shelton et al., *Abortion Utilization: Does Travel Distance Matter?*, 8 FAM. PLAN. PERSP. 260, 262 (1976) (noting negative correlation between abortion rates and distance from abortion facilities strongest for black teenagers). Survey data in Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 FAM. PLAN. PERSP. 125, 126 (1976), suggest that, at least among the women of child bearing age in surveyed poverty areas, only 4% knew of a physician who could provide an abortion. Of those who sought to terminate pregnancies, only 2% used doctors; 80% attempted to terminate the pregnancy themselves. We have every reason to believe that the differential availability of the option of travel is equally great today.

77. Hanna Pitkin, *Obligation and Consent I*, 59 AM. POL. SCI. REV. 990, 995 (1965). A similar approach underlies the claims of JOHN RAWLS, *A THEORY OF JUSTICE* 353-54 (1971): Because the "constitutional convention" in the original position would generate a constitution involving majority rule bound by basic principles of justice, "[b]eing required to support a just constitution, we must go along with one of its essential principles, that of majority rule. In a state of near justice, then, we normally have a duty to comply with unjust laws in virtue of our duty to support a just constitution."

Rawls concludes that, in the original position, the problem of free riding would lead the participants to exclude the possibility of conscientious objection. It is, however, far from clear that a territorial limitation would similarly be discarded, at least where the exit in question is an exit to other reasonably just states. Unless most of American history is at odds with "essential principles," the original position would hardly yield personal rather than territorial jurisdiction as element of the duty to obey. Indeed, from a risk-averse original position, there is much to be said for a rule under which a potential minority with strongly felt views is entitled to exercise those views if it can persuade any of a number of reasonably just societies that the exercise is acceptable, rather than allowing a single state to veto the possibility entirely.

78. Joseph Raz, *Authority and Justification*, in *AUTHORITY* 138 (Joseph Raz ed., 1990); see DWORKIN, *supra* note 75, at 193; GREENAWALT, *supra* note 73, at 162-68; HERZOG, *HAPPY SLAVES*, *supra* note 75, at 206 ("The root intuition [is] . . . if the state is legitimate, we want to uphold it, and a presumption that the law ought to be obeyed is one way of doing that."); RAWLS, *supra* note 77, at 333-62; SIMMONS, *supra* note 69.

79. Indeed, as a number of commentators have pointed out, e.g., DWORKIN, *supra* note 75, at 193, it implies nothing about any particular duty of citizens to support their home institution. "[I]t does not show why Britons have any special duty to support the institutions of Britain." *Id.*; see also SIMMONS, *supra* note 69, at 155-56.

port" my home institution is liquidated by my obedience to its laws within its boundaries and my payment of taxes while I reside there. Second, assuming that we treat both states as "just institutions," when a woman travels from Mississippi to California, this theory imposes upon her a duty to "support" California as well. When California tells her that abortions are a constitutional right, she owes deference to its "just judgments" as well as those of her home. The theory of just institutions provides no obvious way to decide which judgment is correct.

The basis for the claims of obedience to law that has recently been articulated by Professor Raz himself suffers from a similar ambiguity. According to Raz, the obligation of citizens to obey government is based on the "practical authority" of the government, i.e., its ability to resolve moral conflicts more accurately than any individual citizen can.⁸⁰ However weak or strong that obligation may be in most cases, it dissolves in the circumstance where two state governments, both of which can claim similar "practical authority," come to different conclusions about the morality of a practice. While the limited moral capacities of the citizen or the usefulness of mediating principles in generating a pluralistic culture may oblige her to follow the rules of one state or the other, Raz's formula gives no reason to follow the rules of the home state rather than those of the situs state with which they conflict.⁸¹

Indeed, Raz's analysis cuts against an extraterritorial personal law regime. Where all states agree that a practice is to be condemned, their very unanimity is a sign of their practical authority in this matter. Moral dissensus undercuts the claim that one state or the other has the right moral answer. A territorial conception of obligation allows a citizen who can travel to opt for the state that better accords with her own moral insight and thus allows her to combine the strength of her insight with that of the government.

3. *Fairness, Benefits and Mutual Obligation*

Locke's argument about allegiance has been reformulated in a second alternative fashion. The benefits of residence may obligate citizens to the government not because they consent but because, as a matter of "fair play," accepting the benefits of an institution binds the

80. See RAZ, *supra* note 75, at 40-55, 78-80; Raz, *supra* note 78, at 129.

81. Cf. Raz, *supra* note 78, at 133 ("One recurring kind of reason against accepting the authority of one person or institution is that there is another person or institution with a better claim to be recognized as an authority.").

participants to accepting its reasonable burdens as well.⁸² The modern *locus classicus* of the argument is John Rawls:

The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share.⁸³

As support for a theory of extraterritorial obligations, the "fair play" theory is at best equivocal. It binds each participant or beneficiary in an ongoing enterprise to do her part in maintaining the institution by carrying out the duties imposed by that institution in the same way that others are bound. It does not, however, speak initially to the range of that uniform obligation. In a state that seeks to control all of its citizens extraterritorially, each of the citizens is bound to obey that state while abroad. On the other hand, in a state where the common commitment is to obey the state within its borders and not to seek to undermine it while abroad, the obligation of each to follow the laws of her home state is limited to actions within the state's borders. If I am right that the American tradition has run against the imposition of extraterritorial criminal liability, then the argument from fairness provides only limited support for imposing such liability initially.

The fairness argument, indeed, cuts against a selective imposition of extraterritorial liability.⁸⁴ The argument is premised on a belief that each citizen is bound to do her part in the same way that others do. In a situation where most citizens are free to pursue their aims extraterritorially in accordance with the laws of the state they visit, a system that seeks to control only a small group of extraterritorial activities has substantially less claim to obedience as a matter of fairness. The few citizens who seek to pursue the extraterritorially forbidden activities can claim that they are not being asked to sacrifice in the same way as others but in a different and more onerous fashion.⁸⁵

82. A. John Simmons makes this connection between Locke and the "fair play" theorists. SIMMONS, *supra* note 69, at 94.

83. RAWLS, *supra* note 77, at 112 (footnote omitted). For Rawls' other canonical statement, see John Rawls, *Legal Obligation and the Duty of Fair Play*, in LAW AND PHILOSOPHY: A SYMPOSIUM (Sidney Hook ed., 1964) (In the case of a mutually beneficial scheme with the possibility of free riding, "a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating with it."). Rawls elaborated on the insight of H.L.A. Hart, *Are There Any Natural Rights?*, 44 PHIL. REV. 175 (1955).

84. This would be particularly relevant in Model Penal Code states that sought to take advantage of § 1.03(1)(f). See *supra* note 18.

85. Cf. GREENAWALT, *supra* note 73, at 142-44, 147-48 (stating that a distribution of bur-

The fairness argument, moreover, rests most firmly on a duty arising out of a fair relation between benefits and burdens.⁸⁶ By joining a group of colleagues going out to lunch together, I may obligate myself to pick up my share of the check. I do not thereby bind myself to pay a share of their children's college tuition.

Commentators frequently object to the duty of fairness on the ground that the claim that receipt of benefits imposes any obligation is unpersuasive when an individual did not seek the benefits and would reject them if given the chance.⁸⁷ This objection, however, is subject to the Hobbesian rejoinder that few individuals, with the example of Somalia fresh in their consciousness, can plausibly claim that they would reject the assurance of personal security that comes with a system of functioning government. The uncontroversial and pervasive benefit on which duty-of-fair-play theorists can rely to ground a duty of general obedience to law is protection against the violence and disorder that arise in the absence of a system of justice.⁸⁸ Thus, a recent

dens that is unfairly onerous to some undercuts the duty of fair play to bear those burdens: "Citizens have a fair play duty only to do as much as their fellows"; PATEMAN, *supra* note 75, at 122-24; RAWLS, *supra* note 77, at 355 ("Roughly speaking, in the long run the burden of injustice should be more or less evenly distributed over different groups in society, and the hardship of unjust policies should not weigh too heavily in any particular case. Therefore the duty to comply is problematic for permanent minorities that have suffered from injustice for many years."). But see KLOSKO, *supra* note 73, at 63-80 (arguing that as long as distribution can be supported by reasoned argument, and is the result of a "tolerably fair" decision procedure, it must be accepted as fair); *id.* at 34 ("The moral basis of the principle of fairness is the mutuality of restrictions.").

86. The premise of the "fair play" duty is that "the cooperation [of submitting to rules] . . . is required to produce the benefits." KLOSKO, *supra* note 73, at 34; cf. RAWLS, *supra* note 77, at 112 (arguing that when some people "restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.").

87. *E.g.*, DWORKIN, *supra* note 75, at 194; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 93-95 (1974); SIMMONS, *supra* note 69, at 126-34.

88. At some points, Brilmayer seems to suggest that the obligation of a citizen to obey the laws of her state is grounded in the citizen's right to vote in local elections. Brilmayer, *Rights, Fairness and Choice of Law*, *supra* note 64, at 1293 (for locals, sacrifice of rights for the common good can rely on "product of political processes in which the individual has participated"); *id.* at 1298 ("[S]ome basis for obligation must be found. In the purely domestic arena, we seem content to point to the right to participate in political processes.").

While this approach might generate a nexus with all the laws of the state, it will not satisfactorily describe a general system of political obligations, for it would suggest that minors, convicted felons, visitors from out of state, and corporations have no obligation to obey local law. It might also exempt those who do not vote. Cf. HERZOG, HAPPY SLAVES, *supra* note 75, at 213. This connection is overinclusive and normatively undefended. When I, as a Pennsylvania resident, send a contribution to a candidate for governor of California, I am participating in the state's political process, which is my right under the First Amendment. Am I thereby consenting to be bound by the laws that the victorious candidate signs?

Professor Herzog may provide the missing support. In HERZOG, HAPPY SLAVES, *supra* note 75, at 213, he argues that Locke's "root idea" should be conceptualized as being that "political obligation flows from government's being responsive to the people" as a whole. See also *id.* at 205 ("[R]esponsive states are legitimate, and their citizens have an obligation to obey."). The right to vote undergirds political obligation, according to his theory, by guaranteeing responsiveness. However, Herzog recognizes that "the ability of ordinary people successfully to resist and

defender of the duty of fairness observed that "[t]he presumptive good that governments most clearly supply is physical security or protection. If *X* protects *A* from enemies, potential and real, then a strong presumption of obligation is established."⁸⁹

The benefit of physical security is primarily territorially generated; it comes from the mutual obedience to laws within the confines of the state. Pennsylvania does not, and cannot, guarantee my safety when I visit San Francisco; California does and can. When others obey Pennsylvania's law within Pennsylvania, when they comply with prohibitions that protect against adverse impacts within Pennsylvania, or when they pay their fair share of Pennsylvania's costs of maintaining order, I, as a Pennsylvania resident, benefit from this obedience in a way that is hard to disavow. I can be said to owe a reciprocal duty. In contrast, while I am in California and obedience to Pennsylvania law affects only events within California's borders, such obedience is cumulative of the protection that California provides. I have not asked for and might disavow Pennsylvania's extraterritorial protection, and the extraterritorial obedience of other traveling Pennsylvanians provides me with no additional protection. Thus, Pennsylvania's claim in fairness that I repay the benefits of her protection is limited and secondary when I visit San Francisco; California's fairness claims are primary. A state cannot claim universal obedience on the basis of territorially limited benefits.

The Supreme Court's doctrine in the area of taxation reflects the concept that there must be a fair relation between the benefits which the state provides and the obligations it seeks to impose. That doc-

combat government policy," for example in riots, is also a guarantor of responsiveness, *id.* at 204, and hence of legitimacy.

Limiting a state to territorial boundaries provides an additional mechanism for "ordinary people successfully to resist and combat government policy": they may take advantage of opportunities offered in neighboring states. Allowing each individual to decline to obey any law she thinks objectionable would yield chaos. *Cf.* HERZOG, *HAPPY SLAVES*, *supra* note 75, at 202 ("If people disagree about policy, . . . it's inconceivable that all their views be followed."). Allowing exit to other states on particular issues, however, permits citizens to opt into another ordered system.

Elsewhere Brilmayer seems to rest on a broader notion that benefits can generate a claim of political obligation. Brilmayer, *Interest Analysis*, *supra* note 44, at 411; Brilmayer, *Rights, Fairness and Choice of Law*, *supra* note 64, at 1293 (suggesting that one might rely on maximization of the total good of society in that each person who is a member of the society gets a share that is more generous); *id.* at 1304 ("Another attempt to explain territoriality might focus on the benefits that an individual receives upon initiating purposeful contact with the state.").

89. KLOSKO, *supra* note 73, at 113; *cf.* SIMMONS, *supra* note 69, at 122 ("The benefits which citizens receive within the cooperative scheme of a political community may be thought of primarily as the benefits of the rule of law."). DWORKIN, *supra* note 75, at 194, argues that this approach "justifies too much," that a Hobbesian argument must yield a Hobbesian conclusion. But the proposition that provision of personal security is a necessary condition for obligation does not imply that it is a sufficient condition. The "fair play" duty only imposes an obligation to do one's "fair share," which prevents it from toppling off the Hobbesian cliff.

trine casts doubt on the claim that a state may regulate all the extra-territorial activities of a person domiciled within the state. In the tax cases, due process requires both a "‘minimum connection[] between a state and the person, property or transaction it seeks to tax’" and a "‘relat[ion] to ‘values connected with the taxing State.’"'"⁹⁰ With respect to corporations, "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax."⁹¹ Precisely that connection to the activity of obtaining an extra-territorial abortion is lacking in the cases we are considering.

For a natural person, a state may tax the income of out-of-state activities, on the theory that a natural person owes a reasonable degree of support to the state she inhabits in exchange for the protection that makes the receipt of income possible.⁹² The obligation to pay a fair share of the costs of government, however, does not speak to an obligation to obey state policy. The tax on income is an assessment based on what the state regards as the ability to pay, related to the ultimate receipt of income within the jurisdiction,⁹³ not an effort to control the extraterritorial actions of the resident. The wealth of domestic corporations is not localized in the same fashion as natural persons, but rather consists of a network of interactions, and under the Due Process Clause, the state may tax only income proportional to those interactions that take place within the district. For those actions of natural persons, a similar concept suggests that the state may only tax or control activities within the taxing jurisdiction.

Thus, although a state may impose an income tax on its residents' extraterritorial income, on the theory that the increment to the wealth of the resident ultimately takes place within the home jurisdiction, it cannot impose extraterritorial excise, inheritance, or use taxes, which attach to particular extraterritorial activities or tangible property.⁹⁴

90. *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1909-10 (1992) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954), and *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)); see also *Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251, 2258 (1992); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1982); *ASARCO Inc. v. Idaho State Tax Commn.*, 458 U.S. 307, 326-28 (1982); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 219-20 (1980).

91. *Allied Signal*, 112 S. Ct. at 2258; see also *ASARCO*, 458 U.S. at 346 (1982) (O'Connor, J., dissenting) (under Due Process Clause, "[a]s with a nondomiciliary State, a domiciliary State may tax investment income only if it confers benefits on or affords protection to the investment activity").

92. See *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937); *Lawrence v. State Tax Commn.*, 286 U.S. 276, 281 (1932); Seth Goldstein, Note, "Resident" Taxpayers: Internal Consistency, Due Process and State Income Taxation, 91 COLUM. L. REV. 119, 129 (1991).

93. See 300 U.S. at 312-13.

94. Cf. *American Oil Co. v. Neill*, 380 U.S. 451, 458 (1965) (excise tax); *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) (use tax); *Treichler v. Wisconsin*, 338 U.S. 251 (1949) (inheritance tax on tangible property); *Frick v. Pennsylvania*, 268 U.S. 473 (1925) (same).

States must impose use taxes on property used within the jurisdiction, because they are barred from collecting sales taxes on extraterritorial purchases by their residents.⁹⁵ Extraterritorial regulation is more like an excise or sales tax than an income tax.⁹⁶

B. *Community and Necessity*

1. *Community*

Ronald Dworkin has argued recently that the conventional liberal accounts sketched above are all unpersuasive and that the source of the obligation to obey legal commands lies in the "special responsibilities social practice attaches to membership in some biological or social group We have a duty to honor our responsibilities under social practices that define groups and attach special responsibilities to membership" ⁹⁷ Such a justification for obedience to the laws generated by the states of which we are members, however, has two limitations when applied to the problem of extraterritorial abortions. First, if we define the obligation in terms of ongoing social practices, then the fact that, from its founding, our particular political community has denied the power of states to prosecute extraterritorially undercuts the claim that the "social practice" of state citizenship imports a duty to obey my own state's obligations extraterritorially. After adoption of the Fourteenth Amendment, state citizenship, unlike national citizenship, cannot be denied to any American citizen who seeks to reside within the state. The astonishment with which most American citizens who are not conflicts scholars would greet the assertion that the legality of their actions in California is governed by the laws of Pennsylvania hardly supports the claim that our "social practice" entails extraterritorial state jurisdiction.⁹⁸ The norm directing that juries, which are to embody the "conscience of the community" in criminal cases, are to be drawn from the state in which the crime occurs

95. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937); *National Geographic Socy. v. California Bd. of Equalization*, 430 U.S. 551, 555 (1977) (point of use taxes limited to in-state consumption is "to avoid problems of due process that might arise from the extension of the sales tax to interstate commerce.").

96. A similar insight informs the requirement under the Commerce Clause that the tax be "applied to an activity with a substantial nexus with the taxing State, [be] fairly apportioned . . . and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); cf. *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988) (holding that use taxation of domiciliary corporation's activities must meet the *Complete Auto Body* test).

97. DWORKIN, *supra* note 75, at 196, 198; see also Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989). Brilmayer sketched a similar theory of obligation in *Lea Brilmayer, Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 11 (1991).

98. Laycock, *supra* note 27, at 320 ("State boundaries do what ordinary citizens think they do: divide the authority of separate sovereigns.").

suggests that the relevant community, according to our social practices, is the territorial community rather than the community of origin.

Equally important, the argument that my community has a right to define itself by limits on my behavior is balanced by the fact that I am a member of two communities. Under the Fourteenth Amendment, my birth within national boundaries constitutes me a citizen of the United States at the same time that my residence in Pennsylvania entitles me to citizenship in that state, whether or not Pennsylvania desires me as a member of its community. If the state of Pennsylvania has sought to define itself (and me) by its local prohibitions, the United States has equally defined itself (and me) by my entitlement to travel to California and interact with local residents on a basis of equality.

In the American polity that has emerged since the Civil War, the Fourteenth Amendment established the primacy of national citizenship, and the second Reconstruction sealed the primacy of national standards. Where a conflict arises between local and national identities, the local must recede. A claim that Pennsylvania is entitled to prohibit me from committing treason to its ideals by adhering to the visions of other states during visits to their territories is more than counterbalanced by my identity as a national citizen with the right to engage in such experimentation. Our social practice, after all, is not to impel our children to pledge allegiance to the flag of Pennsylvania, but to that of the United States.

2. *The Necessity of Order*

A rejection of consent and its cousins as a basis for political obedience does not necessarily leave such an obligation ungrounded, even in the absence of communitarian claims. David Hume articulated the classic objections to Lockean justifications of political obligation based on consent theory. He nonetheless articulated a powerful case for that obligation based on the necessity of the convention of obedience to law as the mechanism to preserve society against chaos:

men could not live at all in society . . . without laws and magistrates and judges to prevent the encroachments of the strong upon the weak, of the violent upon the just and equitable. . . . If the reason be asked of that obedience which we are bound to pay to government, I readily answer, *because society could not otherwise subsist*⁹⁹

99. HUME, *supra* note 74, at 368. See generally *id.* at 360-68; DAVID HUME, *Treatise on Human Nature*, in HUME'S MORAL AND POLITICAL PHILOSOPHY, *supra* note 74, at 1, 114 ("When men have once experienced the impossibility of preserving any steady order in society, while every one is his own master . . . they naturally run into the invention of government

Hume's approach provides a perfectly adequate basis for demanding obedience to the law of those present within the state's boundaries, or those who act extraterritorially with injurious domestic consequences.¹⁰⁰ However, this justification of a state's legal authority as a necessary protective and coordinating mechanism does not support the claim that states can exercise extraterritorial authority over citizens by virtue of their citizenship. When I visit California, my actions, whatever they may be, do not threaten the public order of Pennsylvania any more than the actions of Californians do. My status as a Pennsylvanian gives my home state no special consequentialist claim to control my actions. Nor is Pennsylvania's intervention necessary to prevent circumstances in California from degenerating into a state of "civil war, insurrection, and violence";¹⁰¹ obedience to the law of California avoids that possibility. Finally, my sense of mutual obligation within Pennsylvania is not undercut by my freedom in California. I do not feel myself to be "the cully of my integrity" for obeying Pennsylvania's law when I am at home; all others are likewise bound.

These notions of right and obligation are derived from nothing but the *advantage* we reap from government"; *id.* at 104 ("We shall quickly perceive how fruitless it is . . . [to] seek in the laws of nature a stronger foundation for our political duties than interest and human conventions"); *id.* at 105 ("To obey the civil magistrate is requisite to preserve order and concord in society.").

The problem as Hume conceived it was what we would today call a prisoner's dilemma: [People] prefer any trivial advantage that is present to the maintenance of order in society, which so much depends on the observance of justice. The consequences of every breach of equity seem to lie very remote, and are not liable to counterbalance any immediate advantage that may be reaped from it. . . . [A]s all men are in some degree subject to the same weakness, it necessarily happens that the violations of equity must become very frequent in society, and the commerce of men by that means be rendered very dangerous and uncertain. . . . Your example both pushes me forward in this way by imitation, and also affords me a new reason for any breach of equity by showing me that I should be the cully of my integrity if I alone should impose on myself a severe restraint amidst the licentiousness of others.

Id. at 98.

The Humean consequentialist argument is approvingly rehearsed in HERZOG, WITHOUT FOUNDATIONS, *supra* note 75, at 180-89; *cf.* KLOSKO, *supra* note 73, at 93-94 (setting forth Humean argument but suggesting that it is vulnerable to general objections to utilitarianism).

100. *Cf.* Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U. L. REV. 431, 447 (1987) ("People create governments and endow them with coercive power out of necessity — to preserve life, liberty, and the pursuit of happiness. . . . Coercive government power must bind everyone within the jurisdiction [T]he power to coerce visitors [as well as citizens] is . . . derived from necessity. They must obey . . . lest government fail in its essential purpose.").

101. HERZOG, WITHOUT FOUNDATIONS, *supra* note 75, at 181; *see* DAVID HUME, *Of Passive Obedience*, in 1 ESSAYS: MORAL, POLITICAL AND LITERARY 460, 462 (T.H. Green & T.H. Grose eds., 1875); *cf.* THOMAS HOBBS, *LEVIATHAN* 272-73 (C.B. MacPherson ed. 1968) (1651) ("The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. . . . [H]e that . . . hath leave to travel, is still Subject; but it is, by Contract between Sovereigns, not by virtue of the covenant of Subjection. For whosoever entrench into another's dominion, is Subject to all the Lawes thereof; unless he have a privilege by the amity of the Sovereigns").

"Anarchism," Professor Brilmayer has earlier commented in treating these problems, "does not have a promising future as a basis for judicial decision making in choice of law cases."¹⁰² But a dread of anarchy, while providing a solid foundation for imposing obligations within a state's boundaries, does not have much of a future as a basis for generating a duty of allegiance when citizens travel abroad.

CONCLUSION

With luck the immediate subject of these arguments will remain academic. There is at least a plausible scenario under which congressional intervention will provide uniform federal protection for abortion rights in the United States. We can, however, expect the general problem of moral dissensus in a federal republic to recur in other domains of contested morality, from traditional issues of sexual conduct to the frontiers of biotechnology.¹⁰³ In cases of such dissensus, both constitutional structure and political theory undergird the proposition that American citizens do not carry the morality of their home states with them as they travel, like fleeing convicts dragging the shackles of their imprisonment. Rather, citizens who reside in each of the states of the Union have the right to travel to any of the other states in order to follow their consciences, and they are entitled to do so within the frameworks of law and morality that those sister states provide.

102. Brilmayer, *Rights, Fairness and Choice of Law*, *supra* note 64, at 1298.

103. Cf. *In re Busalacchi*, No. 59,582, 1991 WL 10048, at *1 (Mo. Ct. App. Jan. 18, 1991) (order prohibiting guardian from transferring ward who was in persistent vegetative state to Minnesota hospital because of perception that he was doing so to avoid Missouri's law on the right to die); Susan F. Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 444-52 (concluding that prosecution of surrogate mothers for contracting for surrogacy outside of the state would be unconstitutional).